to Mr. Rhea, Mr. Rice said, "He's worked for me before, and I didn't like him then and I don't like him now." **Tr. 483.** Mr. Rhea testified, however, that he, Rhea, eventually fired Mr. Ramsey at Janet Cox's exclusive instruction. He testified:

Q: Were you instructed to fire Chip Ramsey by anybody?

A: Well, Ms. Cox, yes.

Tr. 486-487. Mrs. Cox testified that Mr. Rice neither directed her to fire Mr. Ramsey nor suggested that Mr. Ramsey be fired. **Tr. 573.** She testified that she directed the firing of Mr. Ramsey, not because of Michael Rice's dislike of Mr. Ramsey, but because there had been a change in the WBOW format that Mr. Ramsey wasn't happy about, and his attitude reflected in his work. **Id.**

98. **Steven Holler:** John Rhea testified that he hired Mr. Holler, a known "rookie" announcer, whose mother, Margaret worked as the office manager of the Terre Haute stations. **Tr. 487-488.** According to Mr. Rhea, the first day Holler was on the air, Mr. Rice coincidentally was working at the AM transmitter site and heard Holler's on-air performance. Mr. Rice telephoned Mr. Rhea and stated that he wanted Holler off the radio because he "wasn't worth a damn". **Tr. 488.** Mr. Rhea testified that he, Rhea, was upset because he wanted to give Holler a chance. According to Rhea, later that day, he received a phone call from Janet Cox directing him to fire Holler. **Id.** Mrs. Cox, who was opposed to hiring Mr. Holler in the first place (**Tr. 574-575**), contradicted Mr. Rhea's testimony:

Q: And, isn't it a fact that it was Mike Rice that ordered [Holler] fired?

A: No, John Rhea - Mike made some comments regarding him. John Rhea never wanted to hire him in the first place because his mother worked there. But, pardon the expression, he didn't have the guts not to hire him nor to really say you're not good, I'm going to fire you. So, you know.

Q: So who made the ultimate decision to fire him?

A: John Rhea fired him.

Q: Then he ultimately decided to fire him.

A: Yes.

Q: Is that correct? Did he discuss that with you, the firing of Mr. Holler?

A: Yes, he told me that he was going to fire him.

Q: Isn't it a fact that John Rhea was opposed to firing Mr. Holler?

A: No, that's not true.

Tr. 247-248.

99. **John Rhea:** With respect to Mr. Rhea's hiring, Mrs. Cox testified that it was her decision to hire John Rhea and that she did not inform Mr. Rice of her decision until after she had already made the offer to Mr. Rhea. **Tr. 233.**

100. With respect to Mr. Rhea's termination, Mrs. Cox testified that she decided to fire John Rhea, and her reasons for doing so were that the station was not performing to her expectations; there were both revenue problems and personnel problems (**Tr. 234**); Mr. Rhea told her "numerous things" that were not true (**Tr. 249**); and his references had not told the truth when she called them. **Tr 238.** Mr. Hanks testified that he overheard Mr. Rice tell Janet Cox that he was not pleased with John Rhea's lack of motivation of the sales staff, and that Mr. Rice told her that

"your guy [Rhea] has got to go". **Tr. 387.** Janet Cox did not recall the above-referenced conversation or the car trip on which it supposedly occurred.[16] **Tr. 240-241.**

101. With respect to the circumstances of Mr. Rhea's firing, as indicated at ¶54 supra, Janet Cox testified that she had Mr. Rice accompany her to witness her termination of Mr. Rhea. Mr. Rhea admitted that in his experience it was a better policy to have a third party witness to an employee's termination. **Tr. 524-525.** Mr. Rhea's description of his meeting with Mrs. Cox and Mr. Rice was that he, Rhea initiated the conversation by inquiring as to who was to be let go next, and Mr. Rice responded, "you". However, the record reflects that the underlying reason for Rhea's termination was the poor financial performance of the station. **Tr. 496-497.**

102. With respect to programming for WBOW, John Rhea testified that approximately six weeks after he became the General Manager, he had lunch with Michael Rice, and during the conversation, Mr. Rice asked for his opinion about WBOW's programming. Mr. Rhea described the meeting as "no big deal". **Tr. 482-483.** According to Mr. Rhea, sometime later, Mr. Rice asked him to obtain information about the cost of the Satellite Music Network. After doing so and sending the information to Mrs. Cox, Mr. Rhea stated that he received a call from her informing him that the satellite music service was too expensive. **Tr. 502-503, 525.** Mr. Rhea testified that Michael Rice thought that the station could be programmed

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[16] Mrs. Cox recalled only one trip to Terre Haute with Mr. Hanks during which he did some computer work on the music selector, but could not recall whether it was the same trip. **Tr. 241.**

cheaper by bringing in his (Mr. Rice's) own music (**Tr. 503**), which, according to Mr. Rhea, Mr. Rice had been doing. **Tr. 502.** However, Mr. Rhea conceded that notwithstanding what Mr. Rice's views were concerning the satellite music network, he, Rhea, had no reason to believe that Mrs. Cox didn't make her own accounting assessment as to the fact that it was too costly. **Tr. 526.** Finally, in connection with Mr. Rice's alleged involvement in the Terre Haute stations, Mr. Rhea testified that during his tenure with CMI, Mr. Rice remained an absentee owner. **Tr. 506-507.**

(2) Mr. Rice's Alleged Involvement With Personnel and Programming Matters at Station KFMZ

103. As discussed below, Leon Paul Hanks claimed that Michael Rice was involved in various personnel matters at KFMZ. However, Mr. Hanks' testimony differs sharply on this point from that of KFMZ's General Manager Richard Hauschild.

104. **Janice Pratt:** Mr. Hanks testified that Mr. Rice complained that Ms. Pratt "screeches or squawks" and told Hanks to "let her go." However, when presented with prior sworn testimony from his own deposition in his wrongful termination case pending against CBI, Hanks testified as follows:

> Q: Well, you testify here, and I will show you a page of your deposition, page 15. You say, 'The reason she was fired was because she was not showing up for her job on time.' Is that true or is that false?
>
> A: That is correct.
>
> Q: Alright, then, you don't say in here that you fired her because she had a squeaky voice.
>
> A: That is correct as well.

Q: And that's why Mike told you to fire her, right?

A: That is correct.

* * *

Q: The reason why she was terminated was not the reason that you said Mike Rice told you she was terminated. Right? There is a different independent reason?

A. That's correct.

Q. And you terminated her[e] [sic].

A. Yes, I did.

Tr. 441-442.

105. Indeed, Richard Hauschild testified that he told Hanks as early as January 1992 that Ms. Pratt either should be dismissed or correct her problems. Mr. Hauschild testified that Ms. Pratt not only was late for work, but also did not perform certain required tasks on the overnight shift, and she had guests in the studio contrary to station policy. **Tr. 605-606.** According to Mr. Hauschild, Mr. Hanks never told him that Mr. Rice directed him to fire Ms. Pratt or that Mr. Rice had criticized Ms. Pratt's on-air voice. **Tr. 607.**

106. **Robert Kinneson:** Robert Kinneson was a part-time announcer who worked primarily on evenings and weekends. **Tr. 608.** Mr. Hanks testified that Michael Rice directed him to fire Mr. Kinneson because he thought Kinneson was "bringing down the Saturday nights." **Tr. 400.** However, Mr. Hauschild, again, contradicted Mr. Hanks' version of the facts. He testified that Mr. Hanks fired Mr. Kinneson at Mr. Hauschild's suggestion because Mr. Kinneson was not following or adapting to the format. "He was trying to turn a music station into a talk station." **Tr. 609.**

Mr. Hauschild stated that Michael Rice never made any comments to him about Kinneson's performance, nor did Mr. Hanks ever tell him that Mr. Rice wanted Kinneson fired. To Mr. Hauschild's knowledge, Mr. Rice had no involvement in the firing of Mr. Kinneson. **Tr. 609.**

107. **Sean Madden:** Mr. Hanks testified that Michael Rice told him several times that he didn't care for the way Sean Madden, an air personality on KFMZ, sounded on the air. **Tr.408.** However, Hanks then testified that "it wasn't so much his on-air -- well, you know, he mentioned he didn't like him on the air, but it was more his personality as a person he didn't like." **Tr. 409.** According to Mr. Hanks, at the KFMZ 1992 Christmas party, Mr. Rice told him that Madden was "too aloof" and he needed to be let go. **Id.**

108. Richard Hauschild testified that Michael Rice never made any critical comments to him about Madden's performance on the air. Nor, did Mr. Hanks ever tell Mr. Hauschild that Mike Rice didn't like Madden's sound or personality on the air. **Tr. 610.**[17] Rather, Richard Hauschild testified that Mr. Hanks made critical remarks about Mr. Madden to him (Hauschild), and that it was Mr. Hanks who wanted to fire Madden because, in Mr. Hauschild's view, Mr. Hanks saw Madden, from a talent standpoint, as a threat to him. **Tr. 578-579.** However, Sean Madden was never fired; he quit to take a job elsewhere after the first of the year. Mr. Hauschild testified that Madden voluntarily left after he had been moved from the morning shift to evening shift following an Arbitron study and a

[17] Similarly, Janet Cox testified that Mr. Rice never made critical remarks to her about Sean Madden's on-air performance. **Tr. 578.**

station-conducted survey. Mr. Hauschild testified that Madden was unhappy about the move; he viewed it as a demotion and was unhappy about no longer working with his morning shift sidekick, Sally Orzel, who also happened to be his girlfriend. **Tr. 610.**

109. **Jeff Davis:** Mr. Hanks testified that in August 1993, Michael Rice told him that Jeff Davis, an evening disc jockey on KFMZ who then was about 34 or 35 years old, was too old and "was bringing the nights down". According to Mr. Hanks, Mr. Rice told him that "you need to let him go." **Tr. 412.** Yet, Mr. Hanks' description of Davis' leaving was that it "was kind of a mutually agreed to thing." **Tr.413** He stated that he and Davis had "worked too many years together", and "it was one of those things where management became too friendly with the employees". **Id.** So, he met with Davis, told him that Mr. Rice didn't want him on the air at night and that there wasn't another position available, and they arrived at a mutually agreeable date of October 1993 for Davis to leave. Mr. Hanks then testified that he did not agree with Mr. Rice's decision to fire Mr. Davis, and that it was "pretty painful". **Id.**

110. Again, Richard Hauschild's recollection of the circumstances of Davis' departure substantially differs from Mr. Hanks'. Mr. Hauschild testified that Davis had previously worked for the station as a full-time, mid-day announcer. He then left for another job which he lost, and subsequently asked to come back to KFMZ. The only available time slot was the seven to midnight shift, which he reluctantly took. Mr. Hauschild testified that Davis often shared with him that he was fairly discontent; he and

his wife were making plans to move to her home town; they had a new baby and his wife didn't like the fact that he wasn't around every evening. Then, Mark Rose, a previous employee of the station who Mr. Hauschild knew, expressed an interest in coming back to KFMZ. Consequently, Mr. Hauschild and Mr. Hanks jointly met with Davis and relieved him of his responsibilities. According to Mr. Hauschild, Davis was told that Mr. Rose was interested in returning and since Davis had expressed some dissatisfaction with the job and that he may be leaving, they no longer needed his services. Mr. Hauschild agreed with Mr. Hanks that it was an amiable parting. **Tr. 612-613.** However, Mr. Hauschild stated that Paul Hanks did not refer at all to Mr. Rice's alleged feelings about Mr. Davis in the meeting. **Tr. 612.** Further, Mr. Hauschild testified that Mr. Hanks never told him, Hauschild, that Mike Rice wanted Davis fired. **Id.** Nor, did he, Hauschild, and Michael Rice ever discuss the issue of Mr. Davis' age. **Id., Tr. 614.**

c. Miscellaneous Matters

111. In connection with Issue No. 2, the Bureau offered into the hearing record three letters written by Michael Rice, two to Jerrell Shepard, dated April 29, 1993, and August 3, 1993 (**Bur. Exh. 1, pp. 26 and 30**) and one to Dale Palmer, dated April 29, 1993 (**Bur. Exh. p. 24**), each informing the recipient that the construction permit for Station KAAM-FM, Huntsville, Missouri, was not for sale. The two letters to Mr. Shepard were in response to a telephonic or written inquiry made by Mr. Shepard to Mr. Rice. **Bur. Exh. 1, pp. 26, 28, 30.** The letter to Mr. Palmer was in

response to telephonic inquiries made by Mr. Palmer to Janet Cox. **Bur. Exh. 1, pp. 24, 26, 28 and 30.**

D. Issue No. 3: Whether Michael Rice Engaged in An Unauthorized Transfer of Control of the Licensees

112. See Findings at ¶¶7-12 and ¶¶29-31 supra.

III. PROPOSED CONCLUSIONS OF LAW

A. Mr. Rice's Convictions Do Not Adversely Affect the Basic Qualifications of the Licensees

113. The first designated issue in the Show Cause Order inquires whether the basic qualifications of the Licensees to be or remain licensees should be adversely affected by Michael Rice's felony conviction for sexual contact with teenagers. In other words, do the Licensees remain basically qualified to hold Commission licenses and permits under the Commission's character policy statements and cases? As will be discussed below, the answer clearly is in the affirmative.

1. The Licensees Should Not be Disqualified for the Non-Broadcast Misconduct of Mr. Rice

a. The Unlawfulness of the Character Policy Statements

114. At the crux of Issue 1 is the applicability of the Commission's various pronouncements concerning the character qualifications of licensees to the facts and circumstances surrounding Michael Rice's criminal convictions. Between 1986 and 1992, the Commission redefined its policies concerning the character qualifications of FCC licensees and the consequences of criminal violations on their licenses in two key pronouncements:

Character Policy Statement ("CPS-1"), 102 FCC 2d 1179 (1986), recon. granted in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); and Policy Statement and Order ("CPS-2"), 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), partial stay granted, 6 FCC Rcd 4787 (1991), errata, 6 FCC Rcd 5017 (1991), recon. granted in part, 7 FCC Rcd 6564 (1992). CPS-1 focused on penalizing an FCC licensee, permittee or applicant only for criminal felony convictions involving false statements or dishonesty (e.g., perjury, criminal fraud, and embezzlement) on the theory that such convictions are relevant in predicting the propensity of an applicant to be truthful and reliable in its dealings with the Commission. 102 FCC 2d at 1196. However, the Commission also said that felony convictions not involving fraudulent conduct might be relevant if there is a "substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies." Id. at 1197.

115. Moreover, in CPS-1, supra, 102 FCC 2d at 1218 ¶78 and 1228 ¶102, the Commission announced a new policy of automatically equating the character qualifications of licensee corporations with those of their principals. It did so regardless of whether non-FCC-related misconduct was involved, and treated removal of perpetrators as a significant mitigating factor, again regardless of whether non-FCC-related misconduct was involved. These policy conclusions are reflected in the Show Cause Order (at ¶9), which states that "Rice's conviction for serious and multiple felonies

clearly requires that his misconduct must be considered in evaluating Contemporary/Lake's qualifications to remain a Commission licensee".

116. In CPS-2, the Commission revisited CPS-1 and made one significant change: it held that evidence of any felony conviction will be relevant in evaluating a licensee's or applicant's character. 5 FCC Rcd at 3252-53. While CPS-2 broadened the range of relevant non-FCC misconduct to embrace any felony conviction, the Commission nevertheless recognized that not all such convictions are equally probative of an applicant's propensity to be truthful and to conform to FCC rules and policies. 5 FCC Rcd at 3252 ¶4. Accordingly, and importantly, the Commission emphasized that the mitigating factors[18] specified in CPS-1 must still be considered in each individual case involving a felony conviction. 5 FCC Rcd at 3252 ¶5; see also Hara Broadcasting, Inc., 8 FCC Rcd 3177, 3179 (Rev. Bd. 1993); Capitol City Broadcasting Co., 8 FCC Rcd 1726, 1733 (Rev. Bd. 1993).

117. It is against this summary of existing Commission law and policy bearing on a licensee's character that the record evidence must be evaluated. Initially, the record reflects that the three corporate Licensees herein (CBI, CMI, and LBI) and their principals other than Mr. Rice are wholly innocent of the non-broadcast, sexual misconduct of which Michael Rice was convicted. No evidence

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[18] Such mitigating factors include: the willfulness, frequency, currentness and seriousness of the misconduct; the nature of the participation (if any) of managers or owners; efforts made to remedy the wrong; overall record of compliance with FCC rules and policies, and rehabilitation.

was adduced showing anything to the contrary. Also, no evidence was submitted by the Bureau demonstrating that there is any relationship whatsoever between Mr. Rice's sexual misconduct and the Licensees' proclivity to be truthful or to comply with the FCC's rules and policies, as should be required by CPS-1/CPS-2.

118. In light of these facts, the Presiding Judge cannot legally disqualify the Licensees herein under CPS-1/CPS-2 because of Mr. Rice's conviction for sexual misconduct since (a) the record is devoid of evidence of any nexus between Mr. Rice's misconduct and the corporate Licensees' business activities[19] and (b) such misconduct has no relationship to the Licensees' propensity to be truthful and compliant with the Commission's rules and policies. License revocation therefore is neither an appropriate nor a warranted remedy. See CPS-1, supra, 102 FCC 2d at 1206 and 1228. In short, the CPS-1/CPS-2 Policy Statements, as applied to the facts of this case, should be declared arbitrary and capricious under §10(e) of the Administrative Procedure Act, 5 U.S.C. §706 (1988), and therefore unlawful. See Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993)(continued application of integration preference in Commission's 1965 Policy Statement on Comparative Broadcast Hearings held arbitrary, capricious, and unlawful).

119. Importantly, the Commission has never rationally explained, much less justified, the underlying assumptions of CPS-1 or CPS-2 with respect to the ramifications of non-broadcast misconduct on a licensee's character qualifications. Surely, this

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[19] In this connection, see the relevant precedents discussed in Paragraphs 13-18, infra, supporting this proposition.

is a sine qua non to the validity of the two Policy Statements. For example, when the Commission adopted CPS-2 and expanded the character policy's scope to include felonies of any kind as licensee disqualifying factors, it presumed that all felonies, regardless of their underlying nature or the conduct involved, have some bearing on a licensee's propensity for truthfulness and reliability in its dealings with the agency. Nowhere did the Commission establish how or why this is so, and, in fact, it is not.

120. Here, where Mr. Rice's conviction involved sexual misconduct with teenagers, it is Draconian and, the Licensees submit, irrational, to presume automatically that such misconduct is indicative of the Licensees' propensity to be truthful in their dealings with the Commission and to conform with Commission policies, which are core principles to which CPS-1/CPS-2 are directed. There simply is no logical connection between the Commission's presumptions and reality. Nor has the Commission ever even attempted to elaborate its underlying reasoning for its conclusions on these issues.

121. Indeed, in at least two recent cases involving felonious sexual misconduct, the Commission concluded either sub silentio or affirmatively that the misconduct of the party involved had absolutely no bearing on that party's fitness to be a licensee. Specifically, in The Kravis Co., 11 FCC Rcd 4740 (1996), the Commission granted AM and FM renewal applications which had been pending for six years without any discussion of the fact that a May 21, 1991 §1.65 Statement (a copy is attached hereto as Attachment A and official notice is requested) revealed that the president and

sole stockholder of the licensee pled guilty to the felonies of possessing and exhibiting child pornography. Similarly, in Hara Broadcasting, Inc., supra, the Review Board affirmed the grant of an application for a new FM station and declined to add a disqualifying issue against the applicant/licensee whose sole principal was convicted of felonious sodomy, noting "the ALJ's unchallenged observation that the Commission has never disqualified an applicant on the basis of a crime such as [the principal's in this case]." 8 FCC Rcd at 3180.

122. Furthermore, the Commission knows all too well that in the early 1980's, it once relied upon the advice, judgment, and counsel of Stephen Sharp, who served as both General Counsel and a Commissioner of the agency, but who later was convicted of offenses similar to Mr. Rice's. Surely, no one has ever demonstrated -- much less alleged -- that Mr. Sharp's misconduct (which apparently occurred during his watch at the FCC) made his dealings and relationships with the agency dishonest or suspect.[20] Thus, in this case, where the Bureau has failed to demonstrate any link between Mr. Rice's sexual offenses and the Licensees' record before the Commission, the presumption of such linkage simply cannot be made.

123. In any event, contrary to the Commission's pronouncement in CPS-1/CPS-2, prior Commission and judicial precedents do not presume that an individual's misconduct should automatically be attributed to a corporate licensee, or that it is necessary for

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[20] Official notice is requested of the foregoing facts. See Television Digest, October 19, 1992, p. 8; Communications Daily, October 15, 1992; The Commercial Appeal, September 6, 1992.

mitigation purposes to dismiss officers, managers, or employees whose felony offenses were not broadcast-related. "[A]n agency relying on a previously adopted policy statement rather than a rule must be ready to justify the policy 'just as if the policy statement had never been issued'". See Bechtel v. FCC, supra, 10 F.3d at 877, quoting Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974). This the agency cannot do in connection with the Licensees and Mr. Rice, and thus the referenced CPS-1/CPS-2 policies are unlawful.

124. Finally, the Show Cause Order (at ¶9 and n.9) implies that, quoting footnote 60 of CPS-1, supra, 102 FCC 2d at 1205 n.60, Mr. Rice's non-broadcast misconduct might be "so egregious as to shock the conscience...[and] might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee". Here, too, the Commission's CPS-1/CPS-2 character policy is wanting, as applied to the Licensees, because the Commission has never defined "egregious" misconduct or explained why or how allegedly egregious non-broadcast misconduct warrants a "prima facie" conclusion that a licensee lacks the traits of reliability and/or truthfulness necessary to be a licensee, particularly when the "egregious" misconduct is not the conduct of a licensee, but of an individual principal.[21] Neither has the Commission explained why or how such non-broadcast misconduct warrants licensee disqualification if, as

[21] Indeed, in CPS-1, supra, 102 FCC 2d at 1194-95, the Commission stated: "Even egregious non-FCC misconduct . . . has apparently not in itself been found to disqualify existing licensees, at least in the renewal context".

in this case, there is no evidence of a nexus between the misconduct and the business activities of corporate licensees.

b. Commission and Judicial Precedent Support the Illegality of the Character Policy Statements

125. Of utmost importance, in Wilkett v. ICC ("Wilkett"), 710 F.2d 861 (D.C. Cir. 1983), later proceedings, 844 F.2d 867 and 857 F.2d 793 (D.C. Cir. 1988), the U.S. Court of Appeals for the District of Columbia Circuit held that the conviction of the sole proprietor of a trucking company for conspiracy to distribute a controlled substance and second degree murder should not bar the Interstate Commerce Commission ("ICC") from determining that his company was fit to conduct motor carrier operations. In reversing the ICC's decision to deny the company an appropriate authorization, the Court emphasized that the agency's sole focus on the fitness of the individual proprietor -- where, as in Mr. Rice's case, there was no record of company misdeeds -- was "misdirected". 710 F.2d at 863.

126. The Court stated that the primary focus of a licensing inquiry by a Federal regulatory agency (whether the ICC or the FCC) should be on a company's record of operations, not its principals' personal lives. Thus, the Court ruled that it was "unreasonable" for the ICC to conclude that a company was unfit to conduct motor carrier operations solely because of the ICC's view that the individual proprietor's convictions were indicative of a predisposition on the part of the company to violate ICC rules and regulations. Id. at 864. The Court specifically held that the

fitness of the company and its proprietor were "severable" and that the ICC "erred" in equating the two. Id. at 864-65. And the Court so held with the full knowledge that: (a) prior to his incarceration, Mr. Wilkett normally made his company's day-to-day managerial decisions; (b) his son began managing the business when his father's 15-year incarceration started; (c) "his father calls him from prison daily and they discuss business"; and (d) "[h]is father still makes some management decisions." See Wilkett Trucking Co., No. MC-121794 (Sub-No. 7), decided Jan. 18, 1983, slip op. at 1.

127. Shortly before Wilkett was decided by the Court of Appeals, the Commission's Review Board stated that it would not "atomize a licensee into its molecular elements for a gratuitous adjudication on the discrete qualifications...of individual shareholders." See West Jersey Broadcasting Co. ("West Jersey"), 90 FCC 2d 363, 371 (Rev. Bd. 1982). However, this approach is simply wrong in light of Wilkett. In short, the Commission's historical tendency to treat the character qualifications of corporations and their principals as an indivisible entity -- illustrated by the West Jersey case and by the statement in CPS-1, supra, 102 FCC 2d at 1218, that "wrongdoing by corporate managers who are also controlling stockholders will be treated as though the individuals involved were sole proprietors or partners" -- violates Wilkett and frustrates the Commission's own stated goal in CPS-1 to

focus on the Commission-related propensities of licensees, rather than on the private lives of their principals.[22]

128. The Wilkett line of reasoning was implicitly followed in The Petroleum V. Nasby Corp. ("Nasby"), 9 FCC Rcd 6072 (I.D. Oct. 20, 1994), aff'd in part and modified in part, 10 FCC Rcd 6029, recon. granted in part, 10 FCC Rcd 9964 (Rev. Bd. 1995), remanded on divestiture requirement, 11 FCC Rcd 3494 (1996), in which the presiding ALJ and the Review Board both held that the felony convictions of a former officer, director, corporate/communications counsel, and 34.5% voting shareholder of a broadcast licensee did not disqualify the licensee in related license renewal and transfer of control proceedings. 9 FCC Rcd at 6076 ¶32 and 10 FCC Rcd at 6032 ¶21. In granting the applications, the ALJ and the Board reasoned that a corporate licensee should not be punished for the non-broadcast crimes of a principal who is not involved in the day-to-day operations or corporate affairs of the licensee.

129. In Nasby, the ALJ specifically criticized the West Jersey case and said:

> [T]he quoted language could mean, as seemingly urged by the [Mass Media] Bureau, that in no case does the Commission distinguish between guilty and innocent principals, and it is enough if even one of an appli-

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[22] Although the Commission has cited the Wilkett case twice since 1983 -- in CPS-1 (102 FCC 2d at 1195 n.35) and in Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034, 3035 ¶¶'s 9, 15 (1990) -- both times the Commission used the case only to support the proposition that a regulatory agency need not find that all criminal convictions are disqualifying. The Commission never came to grips with the holding in Wilkett, as discussed above. Rather, it ignored the fact that the ICC wanted to disqualify the licensee in Wilkett, but the Court of Appeals reversed because no nexus was shown between the principal's misconduct and the business activities of the corporation.

> cant's principals is convicted of felonious misconduct. However...that is not the law.

9 FCC Rcd at 6075 ¶25, citing Chapman Radio and Television, Co. ("Chapman"), 57 FCC 2d 76 (1975), modified on other grounds, 45 RR 2d 239 (1979), recon. dismissed, 46 RR 2d 752 (1979); Sande Broadcasting Co. ("Sande"), 61 FCC 2d 305 (1976). The Board similarly distinguished its own West Jersey decision and relied, instead, on the Commission's Chapman and Sande cases, holding (10 FCC Rcd at 6032 ¶21):

> Where, as here, there is no evidence of licensee knowledge or involvement in the individual's misconduct, and that individual was not in control of the daily operation and management of the station, there would seem to be no inference to be drawn of a propensity generally by the licensee to disobey the law or the Commission's rules and policies and little public purpose served by punishing it for the transgressions of a single member. The fact that the illegalities occurred here in the context of broadcast proceedings before the Commission, while...deserving of severe sanction with respect to the wrongdoer himself, nevertheless, cannot, without some evidence of greater licensee complicity or scienter on the part of its managing principals, be attributable to the larger corporate entity.

130. In sum, applying the Nasby, Chapman, Sande, and Wilkett reasoning to the instant case, the Licensees should not be penalized because of Mr. Rice's felony conviction unrelated to the Licensees' stations. Hence, the Presiding Judge should declare the CPS-1/CPS-2 Policy Statements arbitrary, capricious, and unlawful as applied to the Licensees herein (or certify the question to the Commission for its ruling), and exonerate the Licensees in accordance with the cited case law. See Bechtel v. FCC, supra.

2. Even if the Character Policy Statements Are Deemed Lawful, the Mitigating Factors Discussed Therein Dictate Exoneration of the Licensees

131. Although there is much discussion in CPS-1/CPS-2 about the relevance of certain "mitigating factors," there is no meaningful discussion about the weight to be given to each factor, or a formula for determining what constitutes sufficient mitigation to overcome the potential adverse effects of misconduct on a licensee's character qualifications. Nonetheless, it appears that the factors which are most significant in the Commission's evaluation of a licensee's fitness are:

(a) a licensee's record of FCC compliance;

(b) remedial and rehabilitation efforts;

(c) lack of managerial involvement in the misconduct;

(d) frequency and currency of the misconduct; and

(e) the nature of the misconduct.

See CPS-1, supra, 102 FCC 2d at 1227-28.

132. Assuming, arguendo, that the CPS-1/CPS-2 Policy Statements are not declared unlawful, as urged above, and are applied to the Licensees, the record evidence amply shows that the Licensees are fully qualified to be or remain licensees. This is so despite Michael Rice's felony conviction, because of the favorable predictive implications of the following mitigating factors as they relate to the Commission's primary "truthfulness" and "reliability" concerns (see CPS-1, supra, 102 FCC 2d at 1195):

a. Licensees' Record of FCC Compliance

133. The Licensees' essentially unblemished Commission record of broadcast performance since inception (CBI - 1979; CMI - 1982; and LBI - 1988) **(Findings ¶17)** shows that Mr. Rice's misconduct has had absolutely no effect upon the stations' or the corporations' abilities to lawfully conduct their broadcast activities.

b. Mr. Rice's Community Reputation and Rehabilitation

134. Factors considered by the Commission in determining whether rehabilitation has occurred in a particular case include: (a) whether the perpetrator has been involved in any significant wrongdoing since the misconduct; (b) how much time has elapsed since the misconduct; (c) the perpetrator's reputation for good character in the community; and (d) meaningful measures taken to prevent future misconduct. CPS-2, supra, 5 FCC Rcd at 3254, n.4, citing RKO General, Inc., 5 FCC Rcd 642, 644 (1990). Under these criteria, Mr. Rice should be treated by the Commission as rehabilitated.

135. Importantly, Mr. Rice has not been involved in any wrongdoing since October 1990, and, therefore, almost six years have elapsed since the last of his charged offenses. In addition, Mr. Rice's impressive broadcast record, referenced in the testimonial letters in evidence herein, fully demonstrates his excellent local reputation. **Findings ¶18-22.** Furthermore, Mr. Rice has undergone in-patient and out-patient psychiatric and medical treatment for his disorders **(Findings ¶¶29, 45)**, and, under

Missouri law,[23] will enter and complete a special rehabilitation program in prison before his release.

136. Under these circumstances, the Presiding Judge should be guided by Alessandro Broadcasting Co., 99 FCC 2d 1 (Rev. Bd. 1984), rev. denied, FCC 85-334 (Comm'n June 28, 1985), aff'd sub nom. New Radio Corp. v. FCC, 804 F.2d 756 (D.C. Cir. 1986), wherein the Review Board held that the conviction for second degree murder of an applicant's controlling shareholder did not warrant either disqualification or assessment of a substantial comparative demerit. The Board concluded that, since the incident was remote in time and the individual was completely rehabilitated under local law, there was no predictive nexus between his past crime and future fitness to be a Commission licensee. 99 FCC 2d at 11, n.13. The same result should occur here, because of Mr. Rice's non-broadcast and remote misconduct and the fact that Mr. Rice will be rehabilitated in accordance with Missouri law upon his release from prison.

c. Participation of Management and Owners

137. The record demonstrates that Mr. Rice, albeit the sole shareholder of CBI and CMI and majority shareholder of LBI and President of all three Licensees, did not act as a "hands-on" manager and policymaker before or after April, 1991. **Findings ¶55.** The Licensees' Vice President, Janet Cox, has functioned as the corporations' and stations' Chief Executive Officer since April

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[23] Section 589.040 of the Revised Statutes of Missouri (§589.040 RSMo) (official notice requested and a copy is attached hereto as Attachment B) provides that imprisoned sex offenders in Missouri must successfully complete a rehabilitative program prior to release.

1991, and General Managers Richard Hauschild, Kenneth Brown, and, until recently, Daniel Leatherman, have assisted her in managerial decisionmaking and overseeing the day-to-day operations of the Stations. **Findings ¶¶46-68.** The Licensees' corporate officers and directors and the managerial staff at each station were completely unaware of, and had nothing to do with, Mr. Rice's misconduct. **Findings ¶23.**

d. Frequency and Currentness of Misconduct And Time Elapsed Since Misconduct

138. The misconduct for which Mr. Rice was convicted occurred between six and eleven years ago (**Findings ¶14**) and, thus, are remote in time. In South Carolina Radio Fellowship, 6 FCC Rcd 4823, 4824 (1991)(emphasis added), the Commission treated criminal conduct that occurred "less than four years ago" as recent. In Mr. Rice's case, all of the crimes occurred more than five years ago. Thus, the Licensees submit that Mr. Rice's crimes should be treated as remote in time, and the record evidence demonstrates the unlikelihood of recurrence of his criminal behavior, particularly in light of Mr. Rice's ongoing rehabilitation, discussed in subsection (b) above.

e. Seriousness of Misconduct

139. As demonstrated above, the sex offenses of which Mr. Rice was convicted are completely unrelated to the broadcast activities of the Licensees. Moreover, since Mr. Rice could have been sentenced to a total of 84 years in prison but was sentenced to only eight years (**Findings ¶15**), the Missouri court clearly meted out a

lenient sentence, which is entitled to significant weight in measuring the nature and seriousness of Mr. Rice's crimes.

140. While Mr. Rice's conviction is clearly "serious" (by definition, all felonies are serious), as the Kravis and Hara cases discussed at ¶121, supra, illustrate, the Commission has previously declined to disqualify licensee corporations whose presidents and sole shareholders were guilty of felony sexual misconduct, and there is no legal basis for treating the Licensees differently. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

f. Measures Taken To Prevent Further Misconduct

141. Once Mr. Rice was formally charged with the crimes in April 1991, the Licensees took prompt remedial steps to remove him from day-to-day managerial and policymaking involvement in the stations' broadcast activities. These remedial steps are more fully treated in Section III.B., infra, which addresses Issue 2. However, since in October 1991, Mr. Rice's doctors advised him to resume some business activities, Janet Cox saw no need to totally ban Mr. Rice from the stations (**Findings ¶40**). The Licensees voluntarily disclosed their remedial steps to the Commission in §1.65 Statements and application exhibits in a timely fashion and at all appropriate stages of Mr. Rice's protracted criminal proceedings. Hence, this patently is not the case of a licensee or applicant "merely standing back and waiting for disaster to strike or for the Commission to become aware" of misconduct before taking any remedial action, which might otherwise warrant a sanction. See CPS-1, supra, 102 FCC 2d at 1218.

142. In sum, the Licensees maintain that the remoteness in time of Mr. Rice's misconduct, the fact that no other principal was involved in such activity, his community reputation and rehabilitation, and the Licensees' remedial efforts -- taken together -- confirm that Mr. Rice's criminal conviction has no bearing on the Licensees' propensity to be truthful and reliable with the Commission or to comply with the agency's rules and policies. Hence, under CPS-1/CPS-2, Hara Broadcasting, and Alessandro Broadcasting, supra, there is no rational justification for revoking the Licensees' licenses and permits because of Mr. Rice's conviction.

3. Revocation Would Violate the Excessive Fines Clause of the Eighth Amendment

143. Revocation of the Licensees' licenses and construction permits would also violate the Excessive Fines Clause of the Eighth Amendment. That Clause provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The excessive penalty of license revocation against the Licensees because of Mr. Rice's felony conviction constitutes an unconstitutional sanction prohibited by recent United States Supreme Court case law.

144. In Austin v. United States, 125 L.Ed. 2d 488 (1993), the Supreme Court held that the Excessive Fines Clause applies to the civil forfeiture of property used to facilitate the commission of a Federal drug offense under 21 U.S.C. §881(a)(4) and (a)(7). Specifically, the Court ruled that a civil forfeiture constituting payment to the government is a punishment because it does not serve